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IN THE

Supreme Court of the United States

October Term, 1962

No. 531

SAMUEL KLAPHOLZ,

Petitioner.

AGAINST

P. A. ESPERDY, as District Director for the New York District, Immigration and Naturalization Service, United States Department of Justice,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Second Circuit, affirming an order of the District Court for the Southern District of New York, dismissing an action for review of an exclusion order and for Declaratory Judgment.

Jurisdiction

The order of the Court of Appeals was rendered and entered on May 18, 1962. The jurisdiction of this Court is invoked under Section 1254(1) of Title 28 U. S. C. and Section 1(b) of Rule 19 of the Revised Rules of this Court as amended.

Statement of Matter Involved

Petitioner was originally admitted to the United States for permanent residence on July 17, 1947. Thereafter he was absent from this country on four (4) occasions, and, remaining without the United States longer than permitted, he lost his status as a permanent resident. In the interim, petitioner's wife and children became United States citizens. Subsequently, a petition, by the citizen spouse, to accord a nonquota immigrant visa to the petitioner was approved. In March, 1956, the United States Consular Office in Germany approved petitioner's application and issued an immigrant visa to him for entry to the United States.

On July 30, 1956, the petitioner arrived aboard the s/s United States, at the port of New York, in possession of said nonquota immigrant visa. As is customary, Immigration Officers boarded the s/s United States on July 30, 1956, and interviewed the petitioner in connection with his application for entry. After this interview, petitioner was directed to wait. The immigration officer telephoned the office of the United States Attorney for the Eastern District of New York. As a result of said telephone call, a United States Marshal appeared aboard the ship and took petitioner into custody. He was detained at the Federal House of Detention in New York, to await further action by the United States Attorney.

Petitioner had not, at this time, been advised as to his immigration status. Twenty-eight (28) days later, for the first time, petitioner was advised by the Immigration Service that he had been paroled into the United States.

On October 12, 1956, petitioner pleaded guilty to a charge of violation of 18 U. S. C. Sections 2 and 545. He was, thereafter, convicted and sentenced to fifteen (15) months at the Federal Correctional Institution at Danbury, Connecticut.

Nine (9) months after his arrival, and application for admission, the petitioner was finally accorded a hearing by the Immigration Service. The Special Inquiry Officer held that petitioner was excludable as one convicted of a crime prior to admission. This hearing was later reopened in order to accord petitioner an opportunity to apply for a waiver of excludability pursuant to Section 5 of the Act of September 11, 1957 (71 Stat. 640) (8 U. S. C. 1182(b), 1958 Ed.).

At the reopened hearing the same Special Inquiry Officer re-affirmed his prior decision holding the petitioner to be an excludable alien, and further, denied petitioner's application for a waiver of excludability. An appeal was taken, from this decision, to the Board of Immigration Appeals.

The Board of Immigration Appeals reversed the Special Inquiry Officer, and directed that petitioner be admitted as a permanent resident on the ground that the petitioner was admissible at the time of his application for admission, to wit: July 30, 1956. This matter came before the Board of Immigration Appeals on two subsequent motions, and on both occasions, the Board of Immigration Appeals reaffirmed its decision. The matter was certified to the Attorney General, who reversed the Board of Immigration Appeals and reaffirmed the original decision of the Special Inquiry Officer.

Judicial review of this decision was sought in the United States District Court for the Southern District

of New York. The Counsel for the Immigration and Naturalization Service moved for summary judgment and his motion was granted by the Honorable Thomas F. Murphy.

An appeal from this decision was taken to the United States Circuit Court of Appeals for the Second Circuit. On May 18, 1962, the Court affirmed the decision of the District Court, dismissing petitioner's action. It is to review this decision that this petition for a Writ of Certiorari is now made.

Questions Presented

There are grave and far reaching questions involved herein which affect not only this petitioner, but virtually every alien seeking admission to the United States. These questions are specifically:

1) Is not the parole power of the Attorney General (Immigration and Nationality Act Section 212(d)(5) (66 Stat. 163; 8 U. S. C. Section 1182(d)(5)) limited to otherwise inadmissible aliens?

2) Is not the question of admissibility to be determined in accordance with the facts as they exist at the time of the application for admission?

Why Certiorari Should Be Granted

The parole power granted to the Attorney General by Section 212(d)(5), *supra*, is limited to otherwise inadmissible aliens. The holdings of the Courts below that the Attorney General did not exceed his authority in paroling an admissible alien were in complete contradiction of the Statute and the intent of Congress.

Not only does every prior judicial decision, dealing with the parole power, involve otherwise inadmissable aliens, but the prior administrative decisions clearly state that the parole power is specifically limited to *otherwise inadmissible aliens.*

> "Parole into the United States of an applicant for admission *presupposes that he is inadmissible* otherwise he should be *admitted, not paroled.* * * *" (Emphasis supplied.) *In the Matter of B* —, 2 I & N Dec. 172, at page 176.

The intention of the Congress in authorizing the parole power is clearly set forth in House Rep. No. 1365, 87th Cong. 2nd Sess. 57 (1952), accompanying H. R. 5678 (the Immigration and Nationality Act).

> "Discretionary authority is vested in the Attorney General in paragraph 5 of Section 212(d) to parole into the United States temporarily *otherwise inadmissible aliens* for emergent reasons or for reasons deemed strictly in the public interest. Such parole shall not be regarded as an admission of the alien and when the purpose of such parole shall have been served, the alien shall forthwith return or be returned to the custody from which he was paroled, and shall continue to be dealt with in the same manner as any other alien applying for admission. The provision in the instant bill represents the acceptance of the recommendation of the Attorney General with reference to this form of discretionary relief. The Committee believes that the broader discretionary authority is necessary to permit the Attorney General to parole *inadmissible aliens* into the United States in emergent cases, such as the case of an alien who requires immediate medical attention before there

has been an opportunity for an Immigration Officer to inspect him and in cases where it is strictly in the public interest to have an *inadmissible alien* present in the United States, such as, for instance, a witness or for purposes of prosecution" (emphasis supplied).

We do not see how the intent of Congress can be more clearly stated than for a House Report to contain the phrase "inadmissible aliens" no less than three (3) separate times in one short paragraph.

This petitioner was concededly admissible at the time of his alleged parole, and therefore, instead of being paroled he should have been admitted.

The Courts below erred in holding that the question of admissibility may be determined on the facts as they exist at the time of hearing rather than as of the time of the application for admission.

The fact that admissibility is to be determined on the facts as they exist at the time of the application for admission has been well established by Statute, administrative and judicial decisions and the clearly illustrated intent of Congress.

Section 212(a) of the Immigration and Nationality Act (8 U. S. C. 1182(a)), the section of the law dealing specifically with the various classes of excludable aliens, employs phrases such as "at the time of application for admission", "prior to the date of application for admission" and "when applying for admission", no less than ten (10) times. Certainly the language of this Statute is extremely clear. The question of admissibility is to be determined on the facts as they exist at the time of application for admission and not at some undetermined future date.

This Court, in *Tulsidas* v. *Insular Collector of Customs*, 262 U. S. 258 at page 264, said:

> "The law defines the classes of aliens which shall be excluded from admission to the United States, but provides that the exclusion shall not apply to persons having the 'status or occupations' of 'merchants'. This means necessarily having the 'status' *at the time admission is sought*, not a status to come or to be established. If the latter, what indulgence of time is to be given for its attainment, and how is detriment to the policy of law while the status is attaining to be prevented, and how terminate the indulgence and the detriment and execute the law. There can be no answer to these questions consistent with the denial that the status of merchant must exist at the time of application for admission" (emphasis supplied).

Further, in *Gegiow* v. *Uhl*, 239 U. S. 3 at page 9, this Court said:

> "The statute by enumerating the conditions upon which the allowance to land may be denied prohibits the denial in other cases."

The decisions of this Court established beyond question the fact that admissibility is to be determined on the facts in existence at the time of the application for admission and any facts to come into existence at a future time are of no consequence.

Also, see: *Conkendall* v. *Skrmetta*, 22 F. 2d 120; *Howe* v. *U. S.*, 247 Fed. 292; *Tillinghast* v. *Wong Wing*, 22 F. 2d 299; *Wong Gook Chun* v. *Proctor*, 84 F. 2d 763.

The intention of Congress that admissibility is to be determined as of the time of the application for admis-

sion is clearly and repeatedly set forth. Not only does the section of the Act dealing with exclusion stress this, but a recent amendment to Section 245(a) of the Immigration and Nationality Act (8 U. S. C. 1255(a)) which provides in part:

> "The status of an alien, other than an alien crewman, who was inspected and admitted or *paroled* into the United States may be adjusted by the Attorney General * * *" (emphasis supplied),

illustrates this to be the intent of the Congress. This amendment added the words "or paroled". For what reason does this section allow a parolee to make a new application for adjustment of status to that of a permanent resident if not to permit facts, not in existence at the time of the original application for admission, to be considered in connection with the question of admissibility at the time of this new application for admission.

The Courts below, in seeking to justify a ruling in contravention of the Statute, prior judicial precedents, and the very intent of the Congress, have raised "humane" issues. They argue that petitioner's contention would jeopardize or penalize the future status of persons paroled for reasons of illness or political necessity, such as the Hungarian refugees, and make them forever inadmissible as having been so at the time of their application for admission. Such a conclusion is completely without foundation in law. Firstly, waivers of excludability in certain cases, provisions for subsequent admission of persons excludable for certain medical reasons and situations such as the Hungarian refugee program, have all been covered by separate and specific legislation none of which would have been necessary were the law as the Courts below have interpreted it. Secondly, those humane cases of parolees not covered by specific legislation

are provided for in the catch-all provision of Section 245(a) *supra*, permitting a new application for admission to be made by a parolee.

The Courts below erred in holding that the parole power applies to aliens other than those who are otherwise inadmissible. Further: the Courts below erred in finding admissibility to be determined at some undetermined time subsequent to the time of the application for admission.

These holdings are in complete opposition to the clear language of the Statute and judicial precedents. Rather than protecting humane and liberal interests, these decisions leave the way open for abuses and extremely restrictive measures on the part of an administrative agency.

Wherefore, petitioner prays that a Writ of Certiorari issue so that a full review of these basic and far reaching issues may be had.

Dated: New York, New York, July 30, 1962.

Respectfully submitted,

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